

Documentation: A key to preventing and winning construction claims

By Andrew Berne and Cody Wilson

Both practically and legally, a picture is worth a thousand words. In both the construction and legal industries, attempting to resolve issues based on oral conversations can be a recipe for further conflict. This is because it is inherently difficult to determine the truth in a “he said, she said” situation. A judge, jury, or owner will need to determine who seems most trustworthy. Therefore, in preventing and prevailing on construction claims, it is essential that contractors create and retain the proper documentation.

One of the most important aspects of documentation is that it is kept on a consistent and contemporaneous basis. To properly utilize construction documentation, it must be kept as a general business practice at the time an event occurs.

One of the most important construction documents is the daily log. Many foremen and superintendents dread the daily log because it is seen as a waste of time at the end of a long day. While a poorly kept daily log may be a waste of time, a properly kept daily log can be the key to avoiding liability. To do it right, a company should document the who, what, when, where, and why of the day. For example, who was performing what work and for how long. Who was visiting the job site and for what purpose. What obstacles or defective work arose, and where did it happen. The weather conditions. What conversations were had and with whom. By recording these items, the contractor is preserving a reliable source of information.

A dispute over payment is common in construction litigation. One of the best ways to resolve or prevent such disputes is to properly record and keep invoices and

pay applications. Proper record keeping maintains the trust relationship. Although it is tempting to hide cost overruns in different items within a schedule of values, such practices can and do result in a loss of the owner’s trust and can push a project into litigation. During the course of litigation, the truth will come out at the expense of the contractor. Avoid such issues by properly documenting costs, and keeping those documents in an organized manner.

No matter the type of claim, photographs and videos provide concrete proof of the status of the job at the time the photograph or video was taken.

To resolve a dispute over delays, contractors need to be keeping and updating proper schedules. While the term CPM scheduling is common within the construction industry, many times the schedule is just a gantt chart without the crucial relationships between tasks. Such schedules fail to provide the information needed to move a job forward and to prove actual delays. Even if a contractor starts out with a true CPM schedule, failure to preserve the baseline schedule and periodic updates as separate files negates any benefit there would have been. If the same file is used and updated, there is no historical data to show which trade caused what delays.

Photographs and video records provide excellent evidence. No matter the type of claim, photographs and videos provide



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concrete proof of the status of the job at the time the photograph or video was taken. In a recent case, an owner claimed that the contractor damaged a road during the course of the construction project. Prior to beginning construction, the contractor recorded the status of the road. The contractor was then able to make a similar video at the completion of construction to affirmatively show the lack of damage.

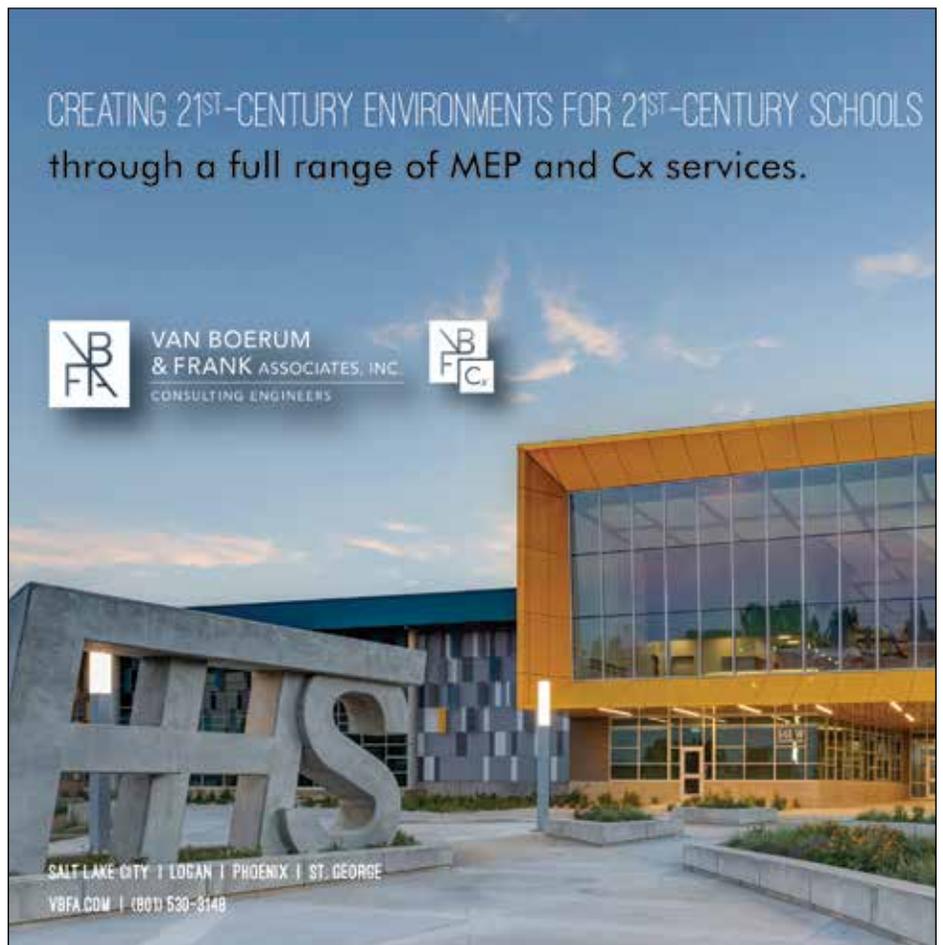
Like most of the types of documentation discussed, recording correspondence can be a double edged sword. While recording important conversations can be a great benefit in proving or defending against a claim, a profanity laced email, or an admission of fault can completely undermine your position. Many clients have said “we agreed to an oral change order” or “we had an agreement,” but without a record to support those conversations, it is very difficult to prove. When it comes to change orders, the Supreme Court of Utah has required strict conformance to contractual written notice requirements. See *Meadow Valley Contractors, Inc. v. UDOT, 2011 UT 35*. A good practice is to follow up conversations with an email summarizing the conversation. This gives you the ability to frame the conversation how you would like, and the

recipient still has the ability to correct it if necessary.

Lastly, a contractor should not over document a job. If a contractor consistently sends vague default notices to multiple subcontractors in an attempt to cover themselves for any and all minor issues, such notices hold little weight. So while it is important to keep and record the documents discussed above, a contractor should be cautious when making broad assertions of damages or default without specifics, and should limit such notices to when an actual default is affecting the project. ■

Cody Wilson is a shareholder of the Salt Lake City law firm Babcock Scott & Babcock. His practice has focused on construction litigation, and he has successfully used all of the documents discussed in this article to prevent and prevail on construction claims. Andrew Berne is an associate with Babcock Scott & Babcock. His practice has also focused on construction litigation, where he utilizes the construction documents discussed in this article to resolve disputes.

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